SEP 24 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 372

CITY OF GALVESTON,
Petitioner,

versus

DOLORES R. MIRANDA, AND 130 LIBELLANTS,
Respondents,

and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Respondent,

and

SOUTHERN STEVEDORING COMPANY, INC.,
Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA AND BRIEF IN SUPPORT OF PETITION.

ROBERT RICHARD THORNTON,
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509-15 U. S. Nat'l Bank Bldg.,
Galveston, Texas,
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HAUSER PRINTING CO., INC., NEW ORLEANS

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, City of Galveston, Texas, a municipal corporation duly organized and existing under and by virtue of the Constitution and laws of the State of Texas, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered June 26, 1953, affirming a decree in admiralty of the District Court for the Southern Dis-

trict of Texas, Galveston Division. That decree granted recovery to Respondents Dolores R. Miranda and 130 Libellants and to Respondent Texas Employers' Insurance Association.

JURISDICTION

Jurisdiction is based upon 28 U. S. Code 1254 (1). The Judgment below was entered on June 26, 1953.

SUMMARY STATEMENT

On August 8, 1949, Dolores R. Miranda and other longshoremen employees of Southern Stevedoring Co., Inc., were allegedly rendered ill while loading grain aboard the S.S. Lipscomb Lykes, at Elevator "B" in Galveston, Texas. During the month of October, 1949, two (2) of the longshoremen filed suit in the State Court for damages; after a lengthy trial in June, 1950 ,the City was exonerated from liability in said case, which was ultimately affirmed by the Texas Supreme Court. In July, 1950, 142 other longshoremen filed their libel against the City of Galveston, as owner and operator of Elevator "B", claiming damages as a result of injuries received while inhaling fumes emanating from the grain. City of Galveston, hereinafter referred to as "City", denied all liability, and further set up the following defenses: (1) That the Deputy Commissioner had in fact, although informally, made an award under the Harbor Workers' and Longshoremen's Compensation Act, 33 U.S.C.A. 933 (b) thereby assigning and transferring all causes of action of libellants to Southern Stevedoring Co., Inc., the employer, or to Texas Employers' Insurance Association, compensation carrier for said employer; (2) the defenses of estoppel by judgment and resadjudicate against all claimants, including Texas Employers'

Insurance Association, by virtue of the State case; (3) and a motion impleading Southern Stevedoring Co., Inc. for contribution toward any damages which might be awarded against the City.

Texas Employers' Insurance Association intervened, setting up its subrogation rights under the Harbor Workers' and Longshoremen's Compensation Act for monies paid to said longshoremen, and further filed its cross-action against the City for Recoupment.

Southern Stevedoring Co., Inc. was dismissed from the suit by the District Court on May 29, 1951; the questions of contributory negligence and damages was severed by agreement of the parties from the rest of the cause, and the case proceeded to trial in April, 1952. On September 11, 1952, the District Court entered its decree finding City liable to the libellants and the insurance company. Appeal was then taken by the City to the United States Court of Appeals for the Fifth Circuit.

Pending the appeal, City settled with each of the libellants, but not Texas Employers' Insurance Association, which moved the Circuit Court to affirm the judgment below, inasmuch as all things were rendered moot by virtue of the settlement. This motion was vigorously opposed by the City, which claimed that its rights as against the insurance company were not affected by the settlement.

The Circuit Court took the motion along with the case, and on June 26, 1953, rendered its opinion sustaining the contentions of Texas Employers' Insurance Association, holding all questions in case moot, and affirming the judgment of the trial court.

THE DECISIONS BELOW

The Trial Court held (R. _____) that the City was negligent in failing to properly fumigate the grain going aboard the Lipscomb Lykes, and in several other corallary particulars; the said Court further denied the City's assertions as to an award having been made, as to estoppel by judgment and adjudication, and further found that Southern Stevedoring Co. was not negligent in any particular. The Trial Court then entered judgment finding the City liable to the libellants and Texas Employers' Insurance Association in such amount of damages as would be assessed in the future.
final judgment, settled with libellants, the Fifth Circuit

On appeal, since City had, in the interim and before held all questions moot as to all parties, including Texas Employers' Insurance Association, because of the settlement, said Court affirming the case, sustaining the insurance company's motion to affirm judgment (R. _____).

QUESTION PRESENTED

Does a settlement without a final judgment with one of two claimants in a cause render the case moot as to the second claimant, with whom no settlement has been made?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The question presented is one of general public importance, one which has never before been decided by this court. Does a defendant in litigation, faced by the possibility of exorbitant damages, and attempting to buy his peace for a few cents on the dollar with one of two claimants, and before final judgment, preclude himself

from determining his ultimate liability with the other, non-settling claimant?

Wherefore, premises considered, Petitioner City of Galveston prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record below, and that the decision of said Court of Appeals be reversed and that Petitioner have such other and further relief as may be just.

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BRIEF IN SUPPORT OF PETITION.

POINT ONE

The question is one of general public importance and one which should be settled by this Honorable Court.

ARGUMENT

It would appear that this case is one in which this Court should exercise its power of supervision and review. The very basic law of compromise and settlement, on which all courts have looked with a high degree of favor from time immemorable, has been shaken to its

roots by the decision of the Court below; thus, also, the common, as well as legal, concept of justice and equity has received a mortal blow.

Here we have a situation in which a defendant in a lawsuit, faced with the possibility of One Million Seven Hundred Seventy-five Thousand Dollars ($1,775,000.00) in damages by one group of claimants, decided to purchase its peace for less than ten cents on the dollar, has lost all rights as against a second claimant when **the ultimate liability of said defendant has not been fully and finally determined and adjudicated!** And so is the law, were the decision below allowed to stand.

The insurance carrier, in this case, did not have to appear. In fact, a careful reading of the Longshoreman's and Harborworker's Act, 33 U.S.C.A. 901-950, will clearly disclose that the procedure outlined by the act was not, in any wise, followed here. Under the Act, on a claim against a tort feasor third party, either the injured longshoreman, or his employer and/or compensation carrier, have a right to proceed, but **not both.** It is true that the Courts have decided, in direct contradiction of the Act, that where the claimant sues a third party for damages, the compensation carrier can intervene, claiming his subrogation rights, and/or file his cross-action against the third party for his expenditures. However, when, as here, the carrier does come in and cross-action, it would seem better law that it stand on its own feet in the suit. We admit the lack of cases on this point, as well as on the general question presented, but feel that justice demands a new approach to the situation.

In view of the favorable attitude taken by all courts

towards compromise and settlement, we think the decision below stands singularly opposed; we further believe that, as pointed out before, if this decision is allowed to stand compensation carriers could, and probably would, bludgeon the longshoremen and/or harbor workers in to farcical settlements; instead of these individuals, for whom the Act was ostensibly written, being able to control litigation, we find this power vested in the insurance companies. And what is the result? In most cases, injured men, as here, faced with an uncertain judgment, together with the untested defenses of a third party, settled with said third party for a few cents on the dollar, whereas the insurance carrier must and shall get a full 100% recovery, regardless of the merits of the case. Is the law written to protect insurance companies?

With the decision of the Fifth Circuit staring at them, the courts are in a dilemma: They must either follow the long established principal of supporting and favoring compromise and settlement, or they must enter upon a policy of favoring the myriad of insurance companies writing compensation insurance. The two positions are unalterably opposed; we hope that this Honorable Court will follow the former by reversing the decision of the Fifth Circuit, sending the case back for a determination on its merits.

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